83-1507

No. 731074

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MICHAEL P. DREHER and CHRISTINA DREHER, et. ux.,

PETITIONERS,

v.

MARTIN MORRISON JR., Individually as a private attorney and also as an employee of Vernon Township, County of Sussex, New Jersey; VERNON TOWNSHIP in the County of Sussex, New Jersey; CARL K. MUTZE, deceased Sanitary Inspector of Vernon Township, as an employee of Vernon Township only; WALTER VANDER WAAL, deceased Building Inspector of Vernon Township, as an employee of Vernon Township only; and the following, Individually, and as present and or former members of Vernon Township Board of Health and or Vernon Township Committee: WILLIAM WALKER, EDWARD SNOOK, RICHARD CONWAY, EDWARD B. KELLEY, ELEANOR KING, CLIFFORD RYERSON JR. and JAMES KILBY,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Vernon Township and its employees should be estopped from utilizing a statute of limitations defense where a Vernon Township attorney represented petitioners purportedly to file timely suit against Vernon Township and its employees wherein the Vernon Township attorney failed to file an action and failed to disclose to petitioners his symbiotic relationship and true employment status with Vernon Township and his ensuing conflicts of interest?

2. Whether the lower courts were inconsistent with other decisions in applying N. J. S. A. 59:8-8, a two year statute of limitations, to all of the individual defendants when the statute in question pertains specifically and only to public entities and not to public employees and where the defendants either admitted, or did not contest, this claim?

3. Whether petitioners were deprived of their constitutional rights, thus providing for jurisdiction in the federal courts, where a Vernon Township attorney represented petitioners purportedly to file timely suit against Vernon Township and its employees in New Jersey Superior Court wherein the Vernon Township attorney failed to file an action and failed to disclose to petitioners his symbiotic relationship and true employment status with Vernon Township and his ensuing conflicts of interest, depriving petitioners of due process and equal protection under the laws?

4. Whether petitioners were deprived of their constitutional rights, thus providing for jurisdiction in the federal courts, where the Dreher family, and other families similarly situated, were denied due process and equal protection under the laws in that Vernon Township Code 40-2 through 12 and Chapter 199, P. L. 1954, were not equally

applied and enforced by Vernon Township officials Walter Vander Waal and Carl K. Mutze who collected private and personal fees from powerful business interests that were involved in the construction of homes in Vernon Township and were treated more favorably?

5. Whether petitioners were deprived of their constitutional rights, thus providing for jurisdiction in the federal courts, where petitioners were denied due process in that they were not advised of meetings and given an opportunity to be heard at a meaningful time and in a meaningful manner by Vernon Township and its officials at the October 27, 1975, April 26, 1976, May 24, 1976, June 28, 1976 and July 26, 1976 meetings wherein punitive actions against petitioners were discussed and the decision to assist petitioners was reversed in the presence of adverse parties who participated in the meetings?

6. Whether petitioners were deprived of

their constitutional rights, thus providing for jurisdiction in the federal courts, where Vernon officials deliberately misled New Jersey State officials in an attempt to deprive petitioners of the protections afforded in Chapter 199 and the Vernon Township Code and in an effort to protect the interests and wrongdoing of Vernon Township and its officials, depriving petitioners of due process?

7. Whether the dismissal hearing before Magistrate Robert B. Cowen in U. S. District Court provided a reasonable opportunity for petitioners to respond where petitioners received Vernon Township's 53 page brief via personal delivery two days prior to the motion date when three other motions were scheduled to be heard and where oral argument was required by the Court even though an attempt was made to raise objections and where Vernon Township's counsel affirmed Magistrate Cowen's query that petitioners did not submit a responsive brief and

whether the matter was prejudicial even though Magistrate Cowen's recommendations were later reviewed by the Hon. Vincent P. Biunno.

PARTIES TO THE ACTION IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1. Petitioners herein and in the Court of Appeals and U. S. District Court

Michael P. Dreher and Christina Dreher, et.ux.

2. Respondents herein and in the Court of Appeals and U. S. District Court

Martin Morrison Jr., Individually as a private attorney and also as an employee of Vernon Township, County of Sussex, New Jersey; Vernon Township in the County of Sussex, New Jersey; Carl K. Mutze, deceased Sanitary Inspector of Vernon Township, as an employee of Vernon Township only; Walter Vander Waal, deceased Building Inspector of Vernon Township, as an employee of Vernon Township only; and the following, Individually, and as present and or former members of Vernon Township Board of Health and or Vernon Township Committee: William Walker, Edward Smock, Richard Conway, Edward B. Kelley, Eleanor King, Clifford Ryerson Jr. and James Kilby

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 731074

MICHAEL P. DREHER and CHRISTINA DREHER, et. ux.,

Petitioners,

v.

MARTIN MORRISON JR., Individually as a private attorney and also as an employee of Vernon Township, County of Sussex, New Jersey; VERNON TOWNSHIP in the county of Sussex, New Jersey; CARL K. MUTZE, deceased Sanitary Inspector of Vernon Township, as an employee of Vernon Township only; WALTER VANDER WAAL, deceased Building Inspector of Vernon Township, as an employee of Vernon Township only; and the following, Individually, and as present and or former members of Vernon Township Board of Health and or Vernon Township Committee: WILLIAM WALKER, EDWARD SNOOK, RICHARD CONWAY, EDWARD B. KELLEY, ELEANOR KING, CLIFFORD RYERSON JR. and JAMES KILBY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Michael P. Dreher and Christina Dreher, et. ux., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on 8 June 1983.

OPINION BELOW

The Court of Appeals entered its Judgment Order on 8 June 1983 affirming the dismissal of Petitioner's action which was dismissed in the United States District Court prior to completion of discovery and prior to trial on the merits, including all state pendant claims, as the action was considered to be untimely pursuant to N.J.S.A. 59:8-8 and without a federal claim. A copy of the Judgment Order of the United States Court of Appeals, Third Circuit, is attached as Appendix A. A copy of the Opinion and Order of the Hon. Vincent P. Biunno, U.S.D.C.J., is attached as Appendix B.

JURISDICTION

On 8 June 1983 the Court of Appeals entered a Judgment Order affirming the dismissal of petitioner's civil action (App. A). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). No other petitioners are involved in this petition.

CONSTITUTIONAL PROVISION INVOLVED

United Staes Constitution, Amendment XIV:

> . . . Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

PRINCIPAL FEDERAL STATUTE INVOLVED

42 U.S.C. S1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

NEW JERSEY STATE STATUTE OF LIMITATIONS

N.J.S.A. 59:8-8:

. . . The claimant shall be forever barred from recovering against a public entity if: . . . b. Two years have elapsed since the accrual of the claim . . .

N.J.S.A. 59:8-9:

Notice of late claim A claimant who fails to file a notice of his claim within 90 days as provided in section 59:8-8 of this act, may in the discretion of a judge of the superior court, be permitted to file such notice at any time within 1 year after the accrual of his claim provided that the public entity has not been substantially prejudiced thereby. Application to the Court for permission to file a late notice of claim shall be made upon affidavits showing sufficient reasons for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act; provided that in no event may any suit against a public entity arising under this act be filed later than 2 years from the time of the accrual of the claim.

N.J.S.A. 2A:14-1:

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors,

agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

STATEMENT OF THE CASE

Vernon Township and its officials were never adjudicated on the merits of the claim.

On August 14, 1974 Michael and Christina Dreher, et. ux., closed on the purchase of a brand new home in Vernon Township in New Jersey. The Dreher family, including four children aged two to nine, moved into the house on that date. The home was purchased, in part, because a physician had advised two members of the Dreher family to move into the country for medical reasons to breathe the clean air.

A number of construction defects, and in particular, a major septic system failure, and other problems, quickly became evident. Raw, foul smelling, blackened septic effluent spread across the surface of the Dreher property from sixty to one hundred feet in length on a daily basis. The effluent spread to the rear of, and across, the entire length

of the house and down both sides of the house towards a neighbor's property, the road and the Dreher well. Permits issued to the builder by Vernon Township officials were fraudulent. After the closing the Drehers learned that their closing attorney was related to the builder's attorney who had a significant financial interest in the builder's corporation. Although the builder was paid in full at the closing many thousands of dollars of liens and encumbrances remained on the property long after its purchase by the Dreher family. Due to the lack of clear title the Title Company delayed issuance of Title Insurance over a prolonged period of time and the bank holding the mortgage threatened to recall the loan. Neighbors complained to Vernon Township officials because of the unbelievable stench and one of the inspectors that was primarily responsible for the acceptance of fraudulent permits threatened to condemn the Dreher home. The inspector also warned that the

well was contaminated and unhealthy. The Dreher family, especially the children, was ridiculed and taunted by neighbor's children because of the foul smelling effluent that permeated the air. Children, inter alia, held their noses, laughed and shouted remarks as the Drehers passed on the road in their car. Friends and relatives could not be invited to the Dreher home because a single flush of the toilet would within moments rise up in the yard. Toilets could not be flushed for days at a time during the winter months when the ground was frozen. Effluent had to be broken with an ice chopper when possible. On cold days effluent would back up into the kitchen sink, over a toilet bowl on to the floor or spray across a room from the washing machine drainpipe. Due to the liens and encumbrances, the hostility of angry teenagers and a lack of large sums of money the Dreher family was not capable of solving their preblems alone by repairing the defects and or moving away.

Martin Morrison Jr., a local attorney, represented the Dreher family in all of these matters from September 24, 1974 through August 5, 1975. Mr. Morrison promised to file suit against Vernon Township, two of its officials, the builder and others in New Jersey Superior Court. Mr. Morrison never in fact filed suit against anyone in behalf of the Drehers even though he repeatedly promised to do so and even though he knew that the Dreher family was living in subhuman conditions. Years later, Michael and Christina Dreher learned that Mr. Morrison functioned as a Vernon Township attorney during the period when he represented them. In addition Mr. Morrison was involved in the making of recommendations to Vernon Township officials concerning septic systems. In August of 1975 Michael and Christina Dreher was advised by a third party that Mr. Morrison did not file suit against Vernon Township because he was seeking a position as a Municipal Judge within the township. In January of 1976 Mr.

Morrison was appointed as a Municipal Judge in Vernon Township.

Michael and Christina Dreher then repeatedly pleaded for aid from Vernon Township officials who promised to assist and to take legal action against the builder. At the request of the Drehers most of the officials visited the Dreher home at least one time and personally witnessed the intolerable conditions. Vernon officials were fully aware of the predicament of the Dreher family and acquired a special relationship and a special duty towards the family through their promises to assist and their personal involvement.

On August 25, 1975 the Vernon Township Sanitation Committee formally promised Michael and Christina Dreher to assist them and to take legal action against the builder because it was determined that fraudulent applications had been submitted to the township concerning the construction of the Dreher home in violation of local ordinances

and state statutes. The Drehers were then asked to leave the meeting, along with one or two other individuals that were present whereupon the officials proceeded to discuss a written communication that was received from Vernon's Board of Adjustment, represented by Martin Morrison Jr., concerning septic systems, perc tests and the collection of private fees by the sanitation inspector. The recommendations coincided with the complaints the Drehers presented to Mr. Morrison in his office.

Without advising the Drehers, the malfunctioning septic system of the Dreher residence was discussed by the same Vernon officials at a Board of Health meeting on October 27, 1975. The decision to assist the Drehers was reversed because of fear of a suit from the builder and

"It was determined that a summons would be issued through the efforts of Attorney Koch and Sanitary Inspector Mutse."

Vernon officials never advised the Dreher family of this adverse action. When personally

asked by the Drehers they continued to give the impression that the Vernon Township Committee would assist them and take legal action against the builder. No action was ever taken against the builder and he was permitted to continue building within Vernon Township. Without advising the Drehers the malfunctioning septic system of the Dreher residence was discussed by the same Vernon officials at Board of Health meetings on April 26, 1976, May 24, 1976, June 28, 1976 and July 26, 1976 wherein punitive actions against the Drehers was discussed in the presence of adverse parties. During all of these times the Dreher family continued to live in unhealthy, degrading and humiliating conditions.

Being unaware of the decision of the Board of Health on October 27, 1975 Michael P. Dreher wrote a letter to the Vernon Township Sanitation Committee and its attorney, Mr. Koch, dated December 29, 1975. The letter, inter alia, requested

" . . . the results of any legal action taken by the Committee"

Mr. Koch replied in a letter dated January 20, 1976. The letter implied that assistance would be forthcoming. Copies of Mr. Koch's letter were sent to the Township Committee which included the same individuals as the Board of Health and Sanitation Committee. Mr. Koch, and the members of the Committee, did not advise the Drehers of the adverse decision taken on October 27, 1975 and during subsequent meetings. Although five months had passed since the August 25, 1975 meeting Mr. Koch referred the matter to Mr. Mutse (the inspector primarily responsible for the difficulties in the first place and the individual who threatened to condemn the Dreher home) who subsequently never replied.

The Drehers then pleaded for assistance from the Governor of New Jersey who referred the matter to various state officials who appeared to be interested in providing support. Certain Vernon officials, however,

deliberately misled the state officials in an attempt to deprive petitioners of the protections afforded in Chapter 199 and the Vernon Township Code and in an effort to protect the interests and wrongdoing of Vernon Township and its officials. State officials withdrew their support as a result. Letters that distorted the truth were sent to the state officials without sending copies to petitioners for rebuttal. Vernon officials never advised the Dreher family that they even communicated with the state officials.

The Dreher home was never condemned. Eventually, after the passage of years, the family solved their problems after much suffering, anxiety, disgrace, hard work and accumulation and expenditure of money. Another attorney, who refused to up against another attorney, maintained a suit against the builder and his corporation. The Drehers were awarded a nominal and insignificant judgment against the corporation on

contract and against the builder personally for fraud when both the attorney representing the Drehers and the attorney representing the builder simultaneously failed to show up in court for trial. The builder's attorney subsequently became a Congressman. Assets from the corporation were liquidated by the builder during the prolonged delays and the Drehers have no idea as to where the builder is now living. Even the nominal judgment was never collected.

Michael P. Dreher enrolled in a law school and filed an action, pro se, along with his wife, prior to the expiration of six years from the accrual of the action in federal court.

On June 25, 1982 Magistrate Robert B. Cowen in United States District Court recommended dismissal of the action even though the Drehers received Vernon Township's fifty three page brief via personal delivery two days before the motion date when three other motions were scheduled to be heard.

Magistrate Cowen permitted Vernon Township attorneys to present argument on their brief before discussing any other pending motion. Vernon Township's counsel affirmed Magistrate Cowen's query that petitioners did not submit a responsive brief. Magistrate Cowen required Michael P. Dreher to respond and give oral argument. An attempt to raise objections due to the fact that Michael P. Dreher was unprepared was rejected by the Court.

On August 18, 1982 the Hon. Vincent P. Biunno, U.S.D.C.J., accepted the recommendations of Magistrate Cowen as modified after permitting petitioners to present additional oral argument. The decision was affirmed by the United States Court of Appeals on June 8, 1983.

Petitioners assert claims and jurisdiction of the United States District Court under the First, Fifth, Sixth, Seventh and Fourteenth Amendments to the United States Constitution, 42 U.S.C. S1981, 42 U.S.C. S1983, 28 U.S.C.

S1331 and 28 U.S.C. S1343.

REASONS FOR GRANTING THE WRIT

Vernon Township and its employees should be estopped from utilizing a statute of limitations defense where a Vernon Township attorney represented petitioners purportedly to file timely suit against Vernon Township and its employees wherein the Vernon Township attorney failed to file an action and failed to disclose to petitioners his symbiotic relationship and true employment status with Vernon Township and his ensuing conflicts of interest.

N.J.S.A. 59:8-9 proscribes the filing of any action against a public entity pursuant to N.J.S.A. 59:8-8 unless a Notice of claim is filed within a maximum period of one year. In this instance the failure to file a timely suit within a two year period is moot and irrelevant. Failure to file a Notice of Claim within one year precedes the possibility of failure to file suit within a two year period. After the passage of one year the Drehers were technically time barred as to an action against Vernon Township. The lower courts, however, should have applied a promissory and or equitable estoppel, precluding

Vernon Township from claiming a statute of limitations defense. This matter is also significant as to Carl K. Mutse and Walter Vander Waal as they both subsequently became deceased.

Under the circumstances of this case the appropriate state law is N.J.S.A. 2A:14-1 which allows six years for such suit to be filed. Vernon Township and its employee and agent Martin Morrison Jr., precluded any possibility of the Dreher family ever complying with N.J.S.A. 59:8-8 and 9, making its applicability and effectiveness null and void. But for the actions of Vernon Township, and its agent Martin Morrison Jr., Vernon Township would have been timely sued, and Carl K. Mutse and Walter Vander Waal would have been alive to be served in personam. The Dreher family did not discover that Martin Morrison Jr. was retained by Vernon Township to represent their Board of Adjustment, during the 1975 period when he represented them, until April of 1981.

Vernon Township cannot be permitted to take advantage of the deliberate wrongdoing of its own employees, including Martin Morrison Jr., without responsibility. What purpose would be served by the Court if the Dreher family were required to adhere to New Jersey statutory provisions that in this particular instance are unjust and void? How can the Drehers be expected to file a timely action against Vernon Township when Vernon Township deliberately prevented that very action? It would seem that such a requirement defeats the very essence of the law.

No man, including Vernon Township as a person, may take advantage or profit from his own wrong. Otherwise, a manifest injustice would result in contravention of the public interest. In Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770, 1959 Mr. Justice Black stated " . . . no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principal has been applied in many

diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

To deny an estoppel would be to reward the wrongful acts of Vernon Township officials, including Martin Morrison Jr. while denying due process to the Dreher family. Johnson v. Railway Express Agency, 421 U.S. 454, 44 L. Ed.2d 295, 1975 states that:

"As the Court noted in Auto Workers v. Hoosier Corp., 383 U.S. at 706-707, considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration."

42 U.S.C. S1988 excludes state application of statutes of limitations wherein they are:

" . . . inconsistent with the Constitution and laws of the United States."

The decision is also inconsistent with Carl F. Peters v. Township of Hopewell, 534 F.Supp. 1324 (D.N.J. 1982) wherein Judge Debevoise analyzes the method by which statutes of limitations are decided within the Third Circuit as follows:

'The Third Circuit directs the district

court to look to the "nature of the conduct involved", not to the kind of person who engaged in that conduct. The nature of the conduct involved in this case is the unlawful destruction and seizure of real and personal property. That kind of conduct is covered by the six year statute of limitations. Were I to apply the two year statute to the Township I would be making a selection on the basis of the kind of person or entity involved and not on the basis of the nature of the conduct. New Jersey courts appear to have adopted the same view of its Tort Claims Act - that is to say it is generally inapplicable to S1983 actions. Woodsum v. Pemberton Tp., 172 N.J.Super. 489, 521, 412 A.2d 1064 (Law Div. 1980) aff'd 177 N.J.Super. 639, 427 A.2d 615 (App.Div. 1981). I see no reason why this observation is not applicable to the time provisions of the Act as well as to its other provisions.
For these reasons the six year, not the two-year, statute will be applied to all defendants in this case, including the Township of Hopewell.'

The lower courts were inconsistent with other decisions in applying N.J.S.A. 59:8-8, a two year statute of limitations, to all of the individual defendants when the statute in question pertains specifically and only to public entities and not to public employees and where the defendants either admitted, or did not contest, this claim.

The decision of the lower courts to apply N.J.S.A. 59:8-8, a two year statute of limitations, to all of the individual defendants is inconsistent with the meaning of the statute and with other decisions. The relevant

part of N.J.S.A. 59:8-8 clearly states that

" . . . The claimant shall be forever barred from recovering against a public entity if . . . "

N.J.S.A. 59:8-9 further describes and places limitations upon N.J.S.A. 59:8-8 by stating

"Notice of late claim A claimant who fails to file a notice of his claim within 90 days as provided in section 59:8-8 of this act, may in the discretion of a judge of the superior court, be permitted to file such notice at any time within 1 year after the accrual of his claim provided that the public entity has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion based upon affidavits showing sufficient reasons for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act; provided that in no event may any suit against a public entity arising under this act be filed later than 2 years from the time of the accrual of the claim."

It is apparant that the statutes in question apply only to public entities, or in this case Vernon Township, and not to any of the individual defendants. It is also evident that an action against a public entity is normally barred if a notice of claim is not filed within one year. Martin Morrison Jr. admitted in papers filed with the U. S.

Court of Appeals, Third Circuit, that the federal action filed by the Drehers was timely as to public employees. Vernon Township admittedly did not even contest the issue. If the New Jersey legislature intended to include public employees in N.J.S.A. 59:8-8 they would have specifically identified such individuals as they have in other portions of the New Jersey Tort Claims Act. In an Order filed May 7, 1981, reaffirmed on May 20, 1981, the Hon. Lawrence A. Whipple, U.S.D.C.J., adopted the Report and Recommendation of Magistrate Hunt in which it was determined that the appropriate statute of limitations for all of the individual defendants was six years pursuant to N.J.S.A. 2A:14-1. This decision was later reversed by the Hon. Vincent P. Biunno, U.S.D.C.J..

Judge Biunno's decision is inconsistent with Martin v. Twp. of Rochelle Park, 144 N.J.Super. 216, 219 (App.Div. 1976) wherein the Court stated that:

"The Tort Claims Act regulates both the substantive liability of public entities as well as the procedural requirements which must be observed when bringing a claim against a public body. The act contains a specific statute of limitations barring actions against a public entity after two years from the accrual of the cause of action."

In Martin the liability of Demetrakis, a public employee, was adjudged to be different from that of the public entity:

"As to the individual defendant Demetrakis, the action, if viable, is governed by the general statute of limitations which allows six years for such suit to be brought. N.J.S.A. 2A:14-1."

Petitioners were deprived of their constitutional rights, thus providing for jurisdiction in the federal courts, where a Vernon Township attorney represented petitioners purportedly to file timely suit against Vernon Township and its employees in New Jersey Superior Court wherein the Vernon Township attorney failed to file an action and failed to disclose to petitioners his symbiotic relationship and true employment status with Vernon Township and his ensuing conflicts of interest, depriving petitioners of due process and equal protection under the laws.

In Roger Swope v. Lawrence Bratton, 541 F.Supp. 99 (W.D. Arkansas 1982) the Court made reference to an attorney who maintained a conflict of interest by functioning as a

hearing officer for the municipality while representing an individual that appeared before his court in a related private matter by stating:

"An attorney should disclose joint representation and the consequences of it to all clients and all parties. . . . a lawyer who is representing one person cannot fairly undertake to advise an opposite party. . . . this situation alone was a denial of due process. . . . the conflict is so egregious that it certainly contributed to the denial of due process . . . the city attorney should have disqualified himself."

Although the conflict of interest of Martin Morrison Jr. was far more egregious in that he promised the Dreher family that he would file suit against Vernon Township, inter alia, while failing to disclose that he in fact functioned as a Vernon Township attorney, the lower courts concluded that there was no possible denial of due process. The United States Supreme Court should give consideration to this inconsistency of decisions.

A conflict also arises with Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed. 2d 185 (1980) wherein the Court concluded:

"Private citizens cannot be sued under S1983 for non-state related activities, e.g., Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3d Cir. 1975). However, if private persons willfully participate in joint action with a state official they are acting under color of state law."

Similarly, in Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 273, 1966 the Court stated that:

'Conduct formerly "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. . . . "Only by sifting facts and weighing circumstances" (Burton v. Wilmington Parking Authority, 365 U.S. 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case.'

The same view was expressed in United States v. Herbert Guest, 383 U.S. 745, 16 L.Ed. 239, 86 S.Ct. 1170, 1966 wherein the Court provided that:

"In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the state was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation."

Petitioners were deprived of their constitutional rights, thus providing for jurisdiction in the federal courts, where the Dreher family, and other families similarly situated, were denied due process and equal protection under the laws in that Vernon Township Code 40-2 through 12 and Chapter 199, P.L. 1954, were not equally applied and enforced by Vernon Township officials Walter Vander Waal and Carl K. Mutse who collected private and personal fees from powerful business interests that were involved in the construction of homes in Vernon Township and were treated more favorably.

Citizens of New Jersey and of the United States must look to government to structure and uphold the laws and to see to it that they are enforced in a fair, reasonable and just manner. When government at any level fails to maintain equitable standards, particularly if fraud, deception and scienter are involved, the very essence of its purpose is destroyed. Respect of government by citizens is correspondingly diminished and the laws and ordinances are of little value except for those who are in a position to abuse their authority and utilize the laws for their own personal improvement. Almost any abuse of authority by government which

results in inequitable implementation of the laws is a deprivation of due process and equal protection under the laws, and it is further in conflict with the public interest. In Marbury v. Madison, 5 U.S. 137, 163, 1 Cranch 137, 163 (1803) Justice John Marshall wrote that:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

The state cannot withhold from a few the procedural protections or the substantive requirements that are available to all others. Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620, 1966.

Walter Vander Waal and Carl K. Mutze applied the laws more harshly and required stricter adherence to the provisions of Chapter 199 and the Vernon Township Building Code as to the Dreher family, and other families similarly situated, when seeking septic and construction approvals, as compared to

powerful business interests that paid private and personal fees, directly to the inspectors. In addition to the Dreher family many other families, most of which had children, suffered great financial losses, humiliation and degradation all of which were precipitated by the identified inequitable construction standards. Families, such as the Dreher family, are entitled to a remedy for such misuse of state power. Government officials and municipalities cannot be immune to the injuries they create while denying equal protection under the laws.

Petitioners were deprived of their constitutional rights, thus providing for jurisdiction in the federal courts, where petitioners were denied due process in that they were not advised of meetings and given an opportunity to be heard at a meaningful time and in a meaningful manner by Vernon Township and its officials at the October 27, 1975, April 26, 1976, May 24, 1976, June 28, 1976 and July 26, 1976 meetings wherein punitive actions against petitioners were discussed and the decision to assist petitioners was reversed in the presence of adverse parties who participated in the meetings.

In a long series of cases property interests have been considered to be important, requiring appropriate standards of due

due process, even though the deprivation lasted for only three days and even though it involved such relatively minor property interests as a driver's license, a bank account, chattels, money, a stove and a bed. Vernon Township and its identified officials knew of the gravity of the predicament of the Dreher family over an extended period of time; yet, they permitted it to continue and denied them due process while deliberately misleading the Drehers as to their true intentions in an attempt to protect the interests of Vernon Township, Walter Vander Waal and Carl K. Mutse. Such conduct by government officials is inexcusable.

In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) the Supreme Court held that negligent conduct by persons acting under color of state law may be actionable under 42 U.S.C. S1983. Similarly, the Court in Hirst v. Gertzen, 676 F.2d 1254 (9th Cir. 1982) stated that:

"Appellants' offer of proof, in our view was sufficient to allege a triable issue that the county defendants' conduct in hiring and supervising their deputies was negligent and created a forseeable risk that a violation of Hirst's civil rights would occur, and in fact proximately caused his death."

In Hirst, a prisoner was found dead in his cell from hanging. Kevin McKenna v. County of Nassau, 538 F.Supp. 737, (E.D.N.Y. 1982) was a S1983 case that alleged deprivation of a constitutional right to be safe and free from assaults and beatings by fellow inmates. The Court held that:

" . . . the court is satisfied that the county may be held liable for the assault upon plaintiff by a large number of fellow inmates when that assault was caused by the county's policy of confining many inmates in a single area. . . .

Defendant's attack on special verdict #3 rests primarily upon the contention that in finding deliberate indifference the jury necessarily found the county liable for conduct of its employees upon a principal of respondeat superior, a doctrine that has no application to a municipal corporation under S1983. See Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); . . .

That deliberate indifference of supervisors to violence done to persons within the custody or control of a governmental agency may give rise to corporate liability can no longer be questioned. Owens v. Haas, 601 F.2d 1242 (CA2 1979), Doe v. New York City Dep't of Social Services, 649 F.2d 134 (CA2 1981)."

Petitioners were deprived of their constitutional rights, thus providing for jurisdiction in the federal courts, where Vernon officials deliberately misled New Jersey State officials in an attempt to deprive petitioners of the protections afforded in Chapter 199 and the Vernon Township Code and in an effort to protect the interests and wrongdoing of Vernon Township and its officials, depriving petitioners of due process.

In Jane Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018, 1978 the Court determined that:

" . . . a local government may not be sued under S1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a governments policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under S1983."

Vernon Township and its officials (all except Morrison) clearly have admitted that all of the actions they took were under color of state law. In this specific instance no one can deny that the letters written to state officials were pursuant to official policy and in behalf of Vernon Township and its Sanitation Committee. Even if it is finally determined that the acts of the Vernon

officials were taken in good faith the Court in George D. Owen v. City of Independence, Missouri, 445 U.S. 622, 63 L.Ed.2d 673, 445 U.S. 651, 1980 held that governmental entities are responsible for the good faith constitutional violations of their officials. The Court clearly states that:

'The central aim of the Civil Rights Act was to provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . . How "uniequely amiss" it would be, therefore, if the government itself - "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" were permitted to disallow liability for the injury it has begotten.'

The dismissal hearing before Magistrate Robert E. Cowen in U. S. District Court did not provide a reasonable opportunity for petitioners to respond where petitioners received Vernon Township's fifty-three page brief via personal delivery two days prior to the motion date when three other motions were scheduled to be heard and where oral argument was required by the Court even though an attempt was made to raise objections and where Vernon Township's counsel

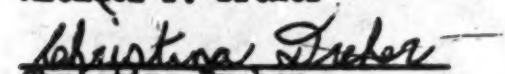
affirmed Magistrate Cowen's query that petitioners did not submit a responsive brief. The matter was prejudicial even though Magistrate Cowen's recommendations were later reviewed by the Hon. Vincent P. Biunno, U.S.D.C.J..

CONCLUSION

For the foregoing reasons, petitioners Michael P. Dreher and Christina Dreher, et. ux., respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Michael P. Dreher



Christina Dreher
Petitioners, Pro Se
P. O. Box 564
Vernon, New Jersey 07462
(201) 875-7681

DATED: August 27, 1983

Resubmitted in corrected form after January 3, 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5596
No. 82-5739

MICHAEL P. DREHER and
CHRISTINA DREHER

v.

MARTIN MORRISON JR., Individually as a private attorney and also as an employee and Municipal Judge of Vernon Township, County of Sussex, New Jersey; VERNON TOWNSHIP in the County of Essex, New Jersey; CARL K. MUTZE, deceased Sanitary Inspector of Vernon Township; WALTER VANDER WAAL, deceased Building Inspector of Vernon Township; and the following Individually, and as present and or former members of Vernon Township Board of Health and or Vernon Township Committee; WILLIAM WALKER, EDWARD SNOOK, RICHARD CONWAY, EDWARD B. KELLEY, ELEANOR KING, CLIFFORD RYERSON, JR., and JAMES KILBY

MICHAEL P. DREHER and CHRISTINA DREHER
Appellants in No. 82-5596

VERNON TOWNSHIP, CARL K. MUTZE,
WALTER VANDER WAAL, WILLIAM WALKER,
EDWARD SNOOK, RICHARD CONWAY,
EDWARD B. KELLEY, ELEANOR KING,
CLIFFORD RYERSON, JR., and JAMES KILBY,
Appellants in No. 82-5739

(Civil No. 80-2594 - D.N.J. - Newark)

District Judge: Honorable Vincent P. Biunno

Submitted Under Third Circuit Rule 12(6)

BEFORE: SEITZ, Chief Judge, HIGGINBOTHAM, ROSENN, Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district be and is hereby affirmed.

The parties shall bear their own costs.

BY THE COURT:

SEITZ
Chief Judge

ATTEST:

SALLY MRVOS
Sally Mrvos, Clerk

DATED: Jun 6 1983

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
Civ. 80-2594

MICHAEL P. DREHER, et. al., Plaintiffs,

v.

MARTIN MORRISOM JR., et. als., Defendants.

Appearances:

Michael P. Dreher and Christina Dreher,
pro se

Feuerstein, Sachs & Maitlin, Esqs. (West
Orange) by Raymond Fleming, Esq. for
defendant Morrison

Stephen S. Weinstein, Esq. (Morristown)
by Glen A. Grau, Esq. for other defendants

OPINION

BIUNNO, Senior District Judge.

This case came on by reason of objections filed July 9, 1982 by the plaintiffs to the Report and Recommendations of the Magistrate, dated June 25, 1982. The defendants other than Morrison filed a notice of motion February 24, 1982, returnable March 22, 1982

for summary judgment. The motion was heard on that date by the Magistrate, with disposition reserved. After the Report and Recommendation dated June 25, 1982 and plaintiffs' written objections of July 9, 1982 the court set hearing for August 12, 1982.

The scope of the action to be taken on written objections is spelled out in the last part of 28 USC S636(b)(1), and includes de novo determinations of so much of the report as is objected to, through acceptance, rejection or modification of the magistrate's findings or recommendations, to the receipt of further evidence, or recommitment to the magistrate with instructions. Because of the nature of some of the objections, the ruling that follows reflects the court's de novo determination on all aspects dealt with. Some embody modifications and others accep-

tance, of the magistrate's findings and recommendation, as will be evident. In a number of instances, what is involved is a revision or clarification of a statement objected to as "clearly erroneous" although the statement as made or as revised or clarified does not bear upon the outcome, and so is not material in the classic sense.

From papers submitted by one side or the other, the background facts are that in 1974, the plaintiffs bought a 5-bedroom frame dwelling located on Lounsberry Hollow Road, Vernon Tp., Sussex County, N. J. (Block 83, Lot 3A). The builder was Oleski Construction, Inc., of which Wayne Oleski was president. There was first a binder, then a full contract, and the title closing is given as August 14, 1974.

At some time after closing various problems are described to have arisen, such as gas leaks, water leaks, improperly installed

insulation and defective operation of the septic tank sewage system. A Jersey City attorney, Henry Witt, Esq., evidently represented plaintiffs at the title closing, but a different attorney, Martin Morrison Jr., Esq. was consulted in respect to the various problems.

On November 8, 1974, for example, he wrote the bank that held the mortgage that he was investigating a back tax problem and asking for the name of the title company and "title number". This was answered by the bank on November 12, 1974 to report that the bank had not received the title policy and had only the preliminary certification of title issued by a New York company.

On November 18, 1974, Mr. Morrison wrote plaintiffs that he had twice tried to contact Mr. Witt and was awaiting his response. On December 18, 1974, plaintiffs and Mr. Morrison signed a request for the file, and

this was sent to Mr. Witt with a letter of the next day, December 19, 1974.

The first mention of a problem with the septic system seems to be in a letter from Mr. Morrison to Oleski Construction, dated December 18, 1974 which says that "in addition" to other problems already brought to his attention, "a severe problem has arisen with regard to the operation of the septic system which is making continued habitation of the aforementioned premises difficult and if it continues, will make said (sic) impossible." The letter goes on to say that if the difficulties were not corrected within 5 days of the letter's receipt, plaintiffs would seek other contractors to make the corrections to allow them to continue to live in the premises, with immediate suit to follow.

In Mid-April, 1975 there are letters from Mr. Morrison to the Secretary of State (for

information about Oleski Construction Inc.), and to U.S. Life Title (for information about the title insurance). On April 21st he wrote plaintiffs to send surveys (one of which was to be returned), and on April 24th Dreher issued a check to him for $150. for "survey and court fees".

But, on August 6, 1975 Morrison wrote Dreher to record a conversation the day before that Dreher no longer wanted Morrison to represent him, and tendered the files.

On August 26, 1975, evidently without an attorney, Dreher appeared before the Vernon Township Board of Health. Those present were William Walker (Chairman), Edward Snook, Richard Conway, Eleanor King, C. Ryerson, Jr., and James Kilby, as members. The minutes reflect an extended discussion took place, with both Sanitary Inspector Nutze and Building Inspector Vander Waal answering questions put by the chairman, and others. Township atter-

ney Koch asked for information from the Drehers. From the discussion, the minutes indicate that the permit application was dated July 2, 1973 and that Dr. R.A. Wilson (apparently a sanitary inspector) had performed the percolation test showing 19 minutes per inch at saturation. The application was for a 3-bedroom house, but the house built had five bedrooms, and so the 1,000 gal. septic tank should have been larger. It also appeared that where there are underground rock ledges, the Code calls for 10 feet of overburden for seepage tanks, and Dreher said there were less than that on his installation. The building permit was also on an application for a 3-bedroom house. The Drehers said the septic system overflowed two months after they occupied the house, and that they had started suit against the builder, Oleski Construction.

Member Ryerson said a "stop work order"

should be put on all Oleski houses under construction. Member Snook moved that if willful misrepresentation was made to the Township, "stop work orders" should be issued on any houses Oleski had under construction. The motion was seconded by Member King with an amendment to take any necessary court action against the builder. The motion carried unanimously.

On October 27, 1975, the minutes show a further discussion of the Drehers' malfunctioning septic system. The builder was reported to have ignored all Township officials. Chairman Walker said there would be no more inspections until the problem is solved on the malfunctioning system. Township Attorney Koch expressed the opinion that permits and inspections could not be stopped on non-related projects and that the Township would be wide open for a court case. It was decided that a summons issue

through the efforts of the Township Attorney and Sanitary Inspector.

Under date of December 1, 1975 Oleski wrote Dreher asking permission to bring a machine on the property to do exploratory digging to learn what was wrong with the system and what has to be done to correct the problem, promising to backfill all trenches or holes but asking waiver of claims for damage to trees, shrubs, plants, etc. Oleski wrote as President of Old Hollow Estates, Inc.

On December 29, 1975 Dreher wrote the Township Attorney asking for the results of any legal action taken by the Sanitation Committee (sic) and for copies of various papers, noting that he had sent copy of his binder of August, 1973 and firm contract of November, 1973 the day after the meeting of August 25th, and that he and his new attorneys had not been informed. The Township

Attorney answered on January 20, 1976 that he had referred the letter to the Board of Health but that since none had been organized under a new ordinance, a copy had been sent to the sanitary inspector. There is a letter for that purpose on the same date, with copy to Dreher.

On April 22, 1976, a site inspection was conducted. The handwritten report of Dennis Tidwell from the N.J. State Dept of Health as well as the typed report dated April 27, 1976, with sketch, by consulting engineer Gloer, embody the details.

Aside from Tidwell, those present were the Drehers, engineer Gloer, sanitary inspector Mutze and Chairman Walker of the Township Board of Health. The report mentions operation of a backhoe but does not indicate who brought it or ran it. The meeting at the site was arranged as the result of a letter from the Drehers' attorneys,

LaSala and DeMarco, Esqs. of Wayne, N.J. that they were contemplating suit against the builder and the Township.

Tidwell's report shows that when the washing machine was turned on, the effluent surfaced immediately. Some 27 minutes later, bathtub water was released and surfaced immediately. A backhoe was then used to uncover the system. There was a 1,000 gal. metal septic tank on a slant. The pipe from it to the seepage pit was not observed. There was two seepage pits following the septic tank, each a 6.5 ft diameter by 3.5 foot high precast concrete seepage tank. There was another seepage pit the same size for the kitchen and laundry. All three seepage pits were probed by engineer Gloor, whose probe struck a rock ledge at the bottom of 2 of the seepage pits, and one foot below the bottom of the third.

Engineer Gloor's report lists Walker as

the former chairman and notes the presence of Bud Kelley, the present chairman. He does not note himself, the Drehers or the backhoe operator.

He notes that neither a grease trap nor a septic tank preceded the 500 gal. seepage pit for the kitchen and laundry, and his probe found no gravel between the pit bottom and the rock ledge. He also notes the 1,000 gal. septic tank followed by two 500 gal. seepage pits, but reports a thin layer of gravel under one, and about 8 inches under the other, before reaching the rock ledge.

Both systems were found filled to overflowing, including the septic tank.

Engineer Gloor also noted that all distances from the house were short of minimum requirements and that the use of a seepage pit for the kitchen and laundry without a septic tank amounted to a cesspool use requiring that it be 150 feet from the well.

The major defects, however, are the size of the septic tank for a 5 bedroom house should be 1,250 gallons, not 1,000 gallons, and that the seepage pit area for a percolation rate of 19 minutes per inch is 108 sq. ft. per bedroom, or 540 sq. ft., compared to 135 sq. ft. provided. The shallow depth to the rock ledge would presumably reduce the seepage rate.

On August 13, 1976, nearly 4 months later, sanitary inspector Mutze wrote Dreher of complaints from neighbors of offensive odors and an unsanitary condition on the property, asking that violation be corrected within 10 days.

This was followed by a letter of August 19, 1976 from the N.J. Department of Environmental Protection to the Vernon Township Board of Health, listing the same items outlined in the report of engineer Gloor dated April 27, 1976 that had previously been sent

to inspector Tidwell in the N.J. Department of Health. It asks for a complete report in 30 days and asks why the system was approved in violation of Chap. 199, when it was approved and by whom; what actions are being taken to insure that the Dreher residence is served by a properly designed and located sewage disposal system which would alleviate his problem.

Sanitary inspector Mutze replied by letter of August 26, 1976, noting that the permit issued on an application for 3 bedrooms. He described the formation as a cracked rock area and not an impervious one. Final inspection was made July 7, 1974 at which time he believed the system to be in substantial compliance with the code. When the system malfunctioned inspection was made by the Board, and on two occasions included a professional engineer and the builder. The builder wrote a letter offering to dig up

the system to find out what was wrong and how it could be corrected, but it was never accepted. Over a period from 1972, there were 1,815 permits issued for subsurface sewage systems, that there have been complaints on about 30, and that all have been investigated and repaired. Many malfunctions were attributed to the inexperience of owners accustomed to continued use after being served by a city sewage system.

The DEP replied on October 7, 1976 claiming that the August 26th letter did not answer the questions raised by the August 19th letter.

Inspector Mutze then evidently took the matter up with Town Attorney Koch, who wrote him on October 18th to recommend that he bring the correspondence to the next Board meeting of October 25th so that an answer could be given under instruction of the entire board.

By letter of October 26th, Chairman Kelley wrote DEP, stated that the system was inspected by Mutze, approved by him on July 7, 1974, and that over the past 2 years Dreher had been offered a new septic system but refused to allow anyone to enter his property. Residents have complained to the Board and it is considering issuance of a summons.

On November 29, 1976, DEP wrote the Board, criticized the approval of the Dreher system as inexcusable, cautioned that DEP would keep a close watch on future approvals of subsurface systems and that if future problems arise from approvals in violation of Chap. 199, DEP would be forced to take any and all necessary legal action against those granting such approvals.

On January 16, 1978, the Drehers came to a Township Committee meeting to ask that they not be ticketed when parking in the road as the driveway is steep and cars cannot park

there when there is ice and snow. Dreher reminded the committee of the various problems since moving to Vernon. He was told that no exceptions or changes could be made for one person out of many who received parking tickets for violating the Snow Removal Ordinance. It was pointed out that he could remove part of the rock ledge on his property to enlarge the driveway for parking.

On March 27, 1978, a judgment was entered in the Superior Court suit brought by the Drehers, in Law Division, Sussex County, Docket L-46309-74. The named defendants were Oleski Construction Corp., Wayne Oleski, Joyce Oleski and Elegant Carpet Co. The judgment of that date is for $11,800 against Oleski Construction Corp. and for $6,500 against Wayne Oleski, individually.

On June 5, 1978, Chairman Kelley wrote the Drehers that complaints had been received about malfunctioning of their septic system

and that immediate steps for repair were required. He was asked to apply for an alteration septic permit and start work within 2 weeks or a summons would issue.

At the argument, Dreher identified exhibits in the case file as recording his having the system pumped out in 1978, and modified by the installation of a diffusion field, in 1980.

The basic state statute governing septic systems of the kind involved is N.J.P.L. 1954, ch. 199, N.J.S.A. 58:11-23 to 42. As originally enacted, the N. J. Department of Health promulgated standards for construction of septic systems, see N.J.S.A. 58:11-36. By N.J.P.L. 1970, c. 33, sec. 10, N.J.S.A. 13 :1D-7a, effective April 22, 1970, this function was transferred to the Division of Environmental Quality and the Commissioner of the Department of Environmental Protection.

A statute enacted after the purchase and closing of August 14, 1974 is the Environ-

mental Rights Act, N.J.P.L. 1974, c. 169, N.J.S.A. 2A:35A-1, to 14, effective December 9, 1974 establish the supplemental remedy of a private suit by any person to enforce statutes designed to prevent or minimize pollution. See, e.g. Birchwood Lakes etc. v. Medford Lakes, 179 N.J.Super. 409 (App. 1981), modified and affirmed, N.J. ___ (#A-107, decided August 3, 1982). Other pertinent cases on state law are Kligman v. Lautman, 53 N.J. 517 (1969); and Jalowiecki v. Lenc, 182 N.J.Super 22 (App. 1981).

Plaintiffs insist that their claims against their attorney, Morrison, are not merely pendent state claims but are mainly federal claims. The theory is that while representing plaintiffs over the period from about September, 1974 to August 5 or 6, 1975 he was attorney for the Vernon Township Board of Adjustment, and then or later

sought and obtained appointment as a municipal judge in the Township. These activities and interests, it is claimed, were in conflict with the duty to plaintiffs and the argument is that although he said he would sue the Township, sanitary inspector Mutze and building inspector Vander Waal as well as the builder, he did not include them as defendants. His failure to do so, it is said is due to his "symbiotic relationship with Vernon Township" and thus his inaction or failure to sue the municipality and its officers amounts to "state action" that renders that aspect of the claims federal ones.

Because plaintiffs argue vigorously that the claims against Morrison are at the heart of the entire amended complaint, each aspect or facet claimed is reviewed separately.

1. By failing to sue the municipality and its officials, while having the indicated relationship, the attorney "denied to these

plaintiffs liberty and property without due process and equal protection under the laws."

2. The same elements "denied to these plaintiffs the right of free speech and the right to petition government for a redress of grievances."

3. The same elements caused plaintiffs to be "denied a speedy trial, assistance of counsel and compulsory process for obtaining witnesses" under the Sixth Amendment and the penumbras to the Amendments.

4. The same elements "denied to these plaintiffs the right to a jury trial."

5. The same elements "denied to these plaintiffs the right to sue, be parties, give evidence and (have) the full and equal benefit of laws as enjoyed by white citizens;" and 42 USC S1981 should not be read to limit claims thereunder to matters of race discrimination.

6. The same elements deprived plaintiffs

of rights prescribed by the New Jersey Fraud statute, NJSA 56:8-1 et seq. This is concededly a state law claim.

7. The same elements show a breach of duty and fiduciary obligations and negligence for the professional field. This is concededly a state law claim.

The only jurisdictional basis pointed out in the More Definite Statement filed March 8, 1982 so far as Morrison is concerned is 28 USC S1331. References to the First (free speech and petition to redress grievances), Fifth (due process), Sixth (speedy trial, compulsory process and assistance of counsel), Seventh (jury trial), and Fourteenth (due process and equal protection) Amendments, as well as to 42 USC S1981, are not jurisdictional. They no doubt refer to the source of each claim or theory, but do not deal with jurisdiction. Since 42 USC S1981 is expressly asserted, and since deprivation or denial of rights under the Amend-

ments listed commonly are civil rights cases under one or another theory, the court will assume that jurisdiction is also asserted under 28 USC S1343.

So far as the state law claims against Morrison are concerned, no independent basis for federal jurisdiction appears and they are here only as "pendent" state claims, see U.M.W. v. Gibbs, 383 U.S. 715 (1966).

The difficulty with plaintiffs' argument is that it ignores the fact that the heart of the whole matter is that the septic system did not have the capacity to handle the volume of wastes generated on the premises. That situation goes back to 1973, when the builder filed an application based on 3 bedrooms. Whether the code or ordinance is wise in keying the percolation area to the number of bedrooms, rather than to the number of persons, is a question not in this case. The fact is that the system as installed

overflowed some two months after plaintiffs' family moved in during August of 1974. The two month lag implies that over the 60 days or so, the system accumulated wastes it could not dissipate at a rate of 33 gal. a day more than its dissipation rate, and so a total of 2,000 gal. filled up the septic tank (1,000 gal) and the two seepage pits (500 gal. each).

This had already happened before Morrison was engaged by plaintiffs. He had not even been at the closing of title, and for all that is known the lawyer at the closing may have been there to represent the bank, the mortgagee, rather than Dreher.

In any event, all of the papers have been searched with care from the original complaint on down, and including briefs that are not part of the record. Nothing remotely suggests that Morrison had anything at all to do with Dreher's difficulties. Those

difficulties already existed when he was first consulted.

Plaintiffs were obviously dissatisfied for some reason, and terminated his services less than a year after he was hired. Despite the repeated references to "full scienter" (sic) and excerpts from various federal decisions, or references to terms used in the Constitution or in civil rights statutes, the fact is that nothing is shown to suggest that Morrison deprived or denied plaintiffs of any federal right, whether grounded on a provision of the Constitution or any law of the United States.

The responsibilities of lawyers to clients, even when appointed by a federal court to represent an indigent facing federal charges, are governed by state law, not federal law, see Ferri v. Ackerman, 444 U.S. 193 (1979). And a public defender performing the traditional functions of a lawyer, does not act "under color of state law" for the purpose of

civil rights claims. See Polk County v. Dodson, ___ U.S. ___, 72 L Ed 2d 509 (1982).

Thus, if the claim against Morrison has any merit it has merit only as a state claim and the only jurisdiction over it would be pendent to the jurisdiction over the other claims.

The claims against the other defendants fall into three subcategories. First, there is the claim against the Township itself, which was dismissed by Judge Whipple before the case was reassigned. Second, there is the claim against the sanitary inspector, Mutze, and the building inspector, Vander Waal. Third, there is the claim against the municipal officials, members of the Board of Health and Township Committee.

Plaintiffs ask that the court review the dismissal of the complaint as to the Township as well. Analysis of that claim is useful as context for evaluating the nature

of the other claims as well.

As indicated by the More Definite Statement filed March 8, 1982 as well as the opposing brief submitted April 5, 1982 and other relevant papers show that the claim against the Township is grounded on respondeat superior for the acts or omissions of its alleged agents, Morrison, the two inspectors, and the other officials. Although federal features are claimed, such as the same First, Fifth, Sixth, Seventh and Fourteenth for the others, as well as 42 USC S1981 and S1983, no conduct independent of theirs is presented as support. Thus the Township claim is a purely state law claim and the order of Judge Whipple is correct.

It must be kept in mind that New Jersey has authority to apply sovereign immunity to political subdivisions, agencies or entities, as well as to public employees, and to lift that immunity on satisfaction of specified

conditions. Those conditions, however, cannot be applied to a federal claim, as one under §1983 because the cause of action or remedy was prescribed by Act of Congress and the states do not have authority to modify the federal act.

But where the claim is found to amount to no more than a state law claim, despite the recital of federal references, then the state law conditions do apply to that claim, and if not satisfied, dismissal is warranted. It must also be remembered that since many federal claims do not have a federal statute setting a statute of limitations, the federal courts are obliged to find and apply that state limitation specified for the most nearly similar kind of claim. This is done as federal law by borrowing from the state statute.

In any event, the claim of vicarious liability because the permits were issued, or

because Morrison did not sue the Township or the inspectors, or because the Board of Health did not issue "stop work" orders on current construction of the same builder or take other action against him, lacks any flavor of federal claims and, if valid at all, would be a state law claim.

The claims against inspectors Mutze and Vander Waal are directly aimed at the permit for the septic system and the building permit which, it is said, were issued on the basis of fraudulent documents that were totally irrelevant to the structure being built (presumably referring to the application by Oleski for a 3-bedroom house when in fact a 5-bedroom house was constructed).

The status of these defendants seems to be that they are in the case only in their official capacities and not as individuals. In fact, when the original complaint was filed on August 15, 1980, both Mutze and

Vander Waal were dead, and the caption of the case so indicates. A letter filed the same day as the complaint instructs the clerk not to issue summons as to these parties, and none has been. It is only in the early part of 1981 that a motion was filed (February 17) and an order filed (March 24) for the filing of answer on behalf of these two deceased individuals in their official capacities.

In several places, plaintiffs complain in their papers that the other defendants have been "recalcitrant" in answering interrogatories needed, in part, to sue in personam the representatives of the deceased inspectors.

This is not a case where a party dies after having been served with process. For that situation, F.R.Civ.P.25 governs as a rule of procedure governing actions already pending in court on the death of a party.

In order for any of the alleged federal claims to survive the deaths of these individuals, there would need to be a federal statute to overcome the usual rule that claims against individuals end with their death in the absence of a survival statute, and aside from claims that can be made in the probate administration of the decedent's estate.

Here, it is evident that both inspectors, Mutze and Vander Waal, had died before the complaint was filed August 13, 1980. It is plaintiffs' obligation to ascertain the county in which their estates are administered, and the identity and address of the personal representative authorized by the surrogate of that county to act in that respect. This is public record information that begins with vital statistics records and continues into county surrogates' records, easily available. In any event, it

is plain that no in personam jurisdiction has been obtained in respect to either decedent's estate or personal representative. The discussion as to them is accordingly confined to the official positions they held.

The claims asserted are that the acceptance of applications that were false and fraudulent, and the issuance of permits on the basis of the false applications was unreasonable action and ministerial (rather than discretionary) action; such acceptance was with "full scienter" (sic) as to the consequences to plaintiffs. They knowingly and recklessly approved work that was in violation of state and municipal requirements and based on fraudulent documentation. If they had performed their state and municipal duties in good faith, plaintiffs' injuries "could have been significantly reduced". These acts and omissions were "so unjust and unfair as to deny plain-

tiffs liberty and property without due process and equal protection under the laws as provided by the Fifth and Fourteenth Amendments.

Second, it is alleged that these circumstances subjected plaintiffs to a deprivation of rights, privileges and immunities secured by the Constitution and laws, under color of New Jersey statutes and the Vernon Municipal Ordinances, as provided by 42 USC §1983.

Third, a state law claim is asserted against them for deprivation of rights prescribed by NJPL 1954, c.199 and the Vernon Township Code 340-2 through 40-12, based on the same underlying facts of acceptance of false and fraudulent applications and issuance of permits thereon in violation of the statute and code.

The claims asserted against the other municipal officials, i.e., Walker, Snook, Con-

way, Kelley, King, Ryerson and Kilby, are evidently based on not proceeding against the builder after having voted at the meeting of August 25, 1975, to do so, and without informing plaintiffs that the Board would not proceed.

First, it is claimed that this was a deprivation of due process and equal protection under the laws as provided by the Fifth and Fourteenth Amendments, particularly since the inspector and the Board of Health were explicitly told by the N.J. Department of Environmental Protection that strict compliance with the state standards for sewerage facilities was required and that it was the responsibility of the Board and its employees to insure that subsurface sewage systems were so installed (NOTE: This evidently refers to par. 6 of the Bellis letter dated October 7, 1976.)

Second, plaintiffs were alleged thereby

to have been deprived of rights, privileges and immunities secured by the Constitution and laws, under color of N.J. statutes and Vernon Tp. ordinances, as provided by 42 USC §1983. This is based on the claim that these defendants knew, or reasonably should have known that their official actions would violate plaintiffs' constitutional rights.

Third, plaintiffs claim to have been deprived of rights as prescribed in N.J.P.L. 1954, c. 199 and Vernon Tp. Code §40-2 through 40-12. This is a state law claim.

These various theories for the different kinds of federal claim asserted are insufficient under the state of facts not in dispute. It is not entirely clear whether the cross-section of the two 500 gallon concrete seepage tanks is intended to be the same as the area of a seepage pit. The printed form used for the percolation test has spaces providing for either a "disposal bed" or a

"seepage pit". There is no entry for a "disposal bed" but 180 sq. ft. per bedroom is indicated for the "seepage pit." In the area listing "Recommendations," there is an entry of 1000 gals. for "septic tank", and of 2-500 gals. for "seepage tank" (emphasis added), but no entry in sq. ft. for either "disposal field area" or for "seepage pit area". The 500 gal. concrete tanks are 6.5 ft. in diameter, and the cross-section of each, by the court's calculation, is only 33.18 sq. ft. each, or 66.37 sq. ft. together. Thus, the cross-section area of the tanks cannot be what was intended by Dr. Wilson, who performed the percolation tests, since he specified 108 sq. ft. per bedroom for seepage pit percolation area. Engineer Gloor's report dated April 27, 1976 gives 135 sq. ft. as the existing percolation area for seepage pit, but does not indicate how this number is derived. In fact, to meet

the required 540 sq. ft. shown in his report would call for an area 25.24 feet on a side if it were formed as a square. This has the sound of some kind of area other than that of the concrete tanks that Dr. Wilson specified.

Hence, if Engineer Gloor's measurement is right, the seepage pit was sufficient to serve only a one bedroom house, let alone a 3 or 5 bedroom house.

Plaintiffs have described repeatedly, in their various papers, the ensuing conditions on the back yard which can only be characterized as revolting, and which need not be detailed here. Suffice it to say that the septic system could not handle the volume of effluent generated in the 5-bedroom dwelling with the consequence that the excess surfaced.

This lack of capacity appeared after the closing of title. Morrison's letter to Olenki of December 18, 1974 establishes

that it had already occurred them. The minutes of the Board of Health meeting of August 25, 1975 indicate that plaintiffs reported that the system overflowed two months after they occupied the house, presumably sometime after the August, 1974 closing.

It no doubt required remarkable stamina, fortitude and determination for the Dreher family to remain in occupancy under these conditions, and in the face of neighbors' complaints, taunts of the children, notices to abate the nuisance, and so on.

Despite all these complexities and the moral indignation that must have ensued, the facts and law do not disclose the invasion, deprivation or denial of any federal right cognizable in this court under any of the theories, constitutional or statutory, that have been advanced or that the court has been able to locate.

In arriving at that conclusion, the court has read the plaintiffs' papers, whether pleadings, motions, affidavits or memoranda with the greatest liberality, and without regard to such study as Dreher has undertaken at law school toward his degree.

Even if there were federal claims, the filing date of August 13, 1980 is long beyond the applicable two-year statute, N.J.S.A. 59:8-8 which has regularly been applied in this District as the period to be borrowed, as federal law, for civil actions against public entities and public employees of the State for deprivation or denial of claimed rights under the Constitution and laws of the United States. In doing so, the claims procedures of that section as well as of NJSA 59:8-9 are disregarded because they cannot be interposed as a condition for access to the federal courts. The Congress may do so as it has in 28 USC §2675 for claims against the United

States, but it has enacted no such conditions to suit against public entities or public employees of a State.

No matter how the question is approached everything of substance in this case involving the municipal defendants occured in 1974 and had been "discovered" in that year. The septic system had overflowed two months after occupancy and certainly by December 18, 1974. Any disadvantage claimed to have arisen from Morrison's work for the Board of Adjustment, or from his seeking and obtaining appointment as a municipal judge ended when his representation of plaintiffs did on August 5, 1975. Even if that late date be taken for the running of the two-year period, it had long elapsed when suit was filed.

Dreher points to the August 25, 1975 meeting with the Board, when the motion to take steps against the builder was voted, and the later failure to act against him. Even so,

if that were an element of the alleged federal claims, the plaintiffs certainly were aware by January 16, 1978 (when they attended the Township Committee meeting about being ticketed), or by June 5, 1978 (when Chairman Kelley wrote about complaints about the septic system and setting two weeks to apply for an alteration permit and start work) everything that has been presented here was known, yet even those dates are more than 2 years before the complaint was filed.

To the extent that the motion is one for summary judgment, the court regards it as directed to the federal claim allegations. Such state law claims as there are have no independent basis for jurisdiction in this court, and in view of the disposition made of the federal claims the court exercises its discretion not to deal with the state law claims but to dismiss them without prejudice.

Objections made by plaintiffs to alleged

inadequate time to prepare on the original motion back in March, 1982 need not be dealt with since an opportunity was provided to make submissions after the hearing, and of course still another submission as well as oral argument was made to the court in connection with its determination de novo embodied in the above ruling.

The Report and Recommendation of the magistrate is revised and modified, and as so revised and modified is accepted and approved and an appropriate order will be entered.

August 18, 1982

s/ Vincent P. Biunno,
U.S.D.J.

Original to Clerk
xc: Michael P. Dreher, Christina Dreher,
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Stephen S. Weinstein, Esq.
Feuerstein, Sachs & Maitlin, Esqs.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY Civ 80-2594

MICHAEL P. DREHER, et. al., Plaintiffs,

v.

MARTIN MORRISON JR., et als., Defendants.

ORDER

For the reasons set out in the opinion of even date herewith,

It is on this 18, day of August, 1982

ORDERED that:

1. Summary judgment on the amended complaint is entered against plaintiffs and in favor of defendants Mutze, Vander Waal, Walker, Snock, Conway, Kelley, King, Ryerson and Kilby on all federal causes of action alleged;

2. All state law claims against the said defendants, as well as all claims against defendant Morrison are lacking in an

independent basis for jurisdiction in this court and are dismissed without prejudice.

s/ Vincent P. Biunno,
U.S.D.J.

Original to Clerk
xc: All parties

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